Jurisdictional Statement

82-65

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

MARGARET R. BROWN, JUDY KNIGHT, JANE MAXWELL, MARY SHENEFIELD, MIRIAM S. STRAUGHAN, SANDRA H. SHUPTRINE, OLIVE J. WHITE,

Appellants,

v.

THYRA THOMSON, as Secretary of the State of Wyoming, ED HERSCHLER, THRYA THOMSON, SHIRLEY W. TTLER and JAMES B. GRIFFITH, as members of the State Canvassing Board, and ED HERSCHLER, as Governor of the State of Wyoming,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, FOR THE DISTRICT OF WYOMING

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

QUESTIONS PRESENTED

1. Has there been a prima facie violation of the equal protection clause of the United States Constitution?

A. Are Wyoming Statutes § 28-2-109(iii) and (c) (xiv) and Article 3, Section 3 of the Wyoming State Constitution unconstitutional?

B. Has there been an improper, illegal dilution of the voting privileges of the Appellants and other citizens and electors of Wyoming in violation of the 14th Amendment, Constitution and Statutes of the United States of America?

2. Are there legitimate considerations incident to the effectuation of a rational state policy justifying violation of the Amendments, Constitution and Statutes of the United States of America and the State of Wyoming?

PARTIES TO THE PROCEEDING

The Appellee-Intervenors, all residents of Niobrara County, Wyoming, have not been set forth in the caption of this case and are as follows: James L. Thompson, Gerald D. Bardo, Russell Thompson, Kenneth A. Gropp, Richard G. Pfister, Peter M. Hansen, Gertrude Chamberlain, Betty Percival, Mary L. Burke, Board of County Commissioners of the County of Niobrara, Kenneth R. Freeman, as a County Commissioner of the County of Niobrara and in his individual capacity, and Louis L. Landkamer as a County Commissioner of the County of Niobrara and in his individual capacity.

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OPINIONS BELOW

The above-entitled case, *Brown v. Thomson*, is reported at 536 F. Supp. 780 (1982).

STATEMENT OF JURISDICTIONAL GROUNDS

This is a challenge to the constitutionality of the 1981 Apportionment Act of the Wyoming State Legislature which granted a representative to the Wyoming House of Representatives from Niobrara County, although that county's population would not otherwise entitle it to a representative.

Federal jurisdiction is based upon 28 U.S.C. § 1343(3) and (4). A three-judge court was convened pursuant to 28 U.S.C. § 2281.

Appellate jurisdiction of this Court is based on 28 U.S.C. § 1253.

Appeal is taken from the Order of Dismissal with Prejudice entered by the United States District Court for the District of Wyoming on April 21, 1982. The Notice of Appeal was filed on May 12, 1982 in the United States District Court for the District of Wyoming.

CONSTITUTIONAL PROVISIONS, AMENDMENTS AND STATUTES

U.S. CONST. amend. XIV, § 1 provides:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

WYO. CONST. art. 3, § 3 provides:

> "Each county shall constitute a senatorial and representative district; the senate and house of representatives shall be composed of members elected by the legal voters of the counties respectively, every two (2) years. They shall be apportioned among the said counties as nearly as may be according to the number of their inhabitants. Each county shall have at least one senator and one representative; but at no time shall the number of members of the house of representatives be less than twice nor greater than three times the number of members of the senate. The senate and house of representatives first elected in pursuance of this constitution shall consist of sixteen and thirty-three members respectively."

WYO. STATUTES § 28-2-109 provides:

(a) The ratios for the apportionment of senators and representatives are fixed as follows:

> (i) The ratio for the apportionment of senators is the smallest number of people per senator which when divided into the population in each senate district as shown by the official results of the 1980 federal decennial census with fractions rounded to the nearest whole number results in a senate with thirty (30) senators;
>
> (ii) The ratio for the apportionment of the representatives is the smallest number of people per representative which when divided into the population in each representative district as shown by the official results of the 1980 federal decennial census with fractions rounded to the nearest whole number results

in a house with sixty-three (63) representatives;

(iii) *If the number of representatives for any county is rounded to zero (0) under the formula in paragraph (a)(ii) of this section, that county shall be given one (1) representative which is in addition to the sixty-three (63) representatives provided by paragraph (a)(ii) of this section;*

(iv) If the provisions of paragraph (a)(iii) of this section are found to be unconstitutional or have an unconstitutional result, then Niobrara county shall be joined to Goshen county in a single representative district and the house of representatives shall be apportioned as provided by paragraph (a)(ii) of this section.

(b) Representation in the state senate is hereby apportioned and divided among the several senatorial districts as follows:

(i) Albany county shall have two (2) senators;

(ii) Big Horn county shall have one (1) senator;

(iii) Campbell and Johnson counties combined shall have two senators;

(iv) Carbon county shall have one (1) senator;

(v) Converse county shall have one (1) senator;

(vi) Crook and Weston counties combined shall have one (1) senator;

(vii) Fremont county shall have two senators;

(viii) Goshen and Niobrara counties combined shall have one (1) senator;

(ix) Hot Springs and Washakie counties combined shall have one (1) senator;

(x) Laramie county shall have four (4) senators;

(xi) Lincoln county shall have one (1) senator;

(xii) Natrona county shall have four (4) senators;

(xiii) Park county shall have one (1) senator;

(xiv) Platte county shall have one (1) senator;

(xv) Sheridan county shall have two (2) senators;

(xvi) Sublette and Teton counties combined shall have one (1) senator;

(xvii) Sweetwater county shall have three (3) senators; and

(xviii) Uinta county shall have one (1) senator.

(c) Representation in the state house of representatives is hereby apportioned and divided among the several representative districts as follows:

(i) Albany county shall have four (4) representatives;

(ii) Big Horn county shall have two (2) representatives;

(iii) Campbell county shall have three (3) representatives;

(iv) Carbon county shall have three (3) representatives;

(v) Converse county shall have two (2) representatives;

(vi) Crook county shall have one (1) representative;

(vii) Fremont county shall have five (5) representatives;

(viii) Goshen county shall have two (2) representatives;

(ix) Hot Springs county shall have one (1) representative;

(x) Johnson county shall have one (1) representative;

(xi) Laramie county shall have nine (9) representatives;

(xii) Lincoln county shall have two (2) representatives;

(xiii) Natrona county shall have nine (9) representatives;

(xiv) Niobrara county shall have one (1) representative;

(xv) Park county shall have three (3) representatives;

(xvi) Platte county shall have two (2) representatives;

(xvii) Sheridan county shall have three (3) representatives;

(xviii) Sublette county shall have one (1) representative;

(xix) Sweetwater county shall have five (5) representatives;

(xx) Teton county shall have one (1) representative;

(xxi) Uinta county shall have two (2) representatives;

(xxii) Washakie county shall have one representative; and

(xxiii) Weston county shall have one (1) representative. (Laws 1981, ch. 7, § 1.)

ESSENTIAL FACTUAL CONSIDERATIONS

AND

THE LOWER COURT'S DECISION

The 1971 Wyoming Apportionment Act provided for a 62 member House of Representatives. Under that Act, Goshen County received two representatives and Niobrara County received one representative.

The results of the 1980 dicennial census for the State of Wyoming indicated a population growth of approximately 24% from 332,416 to 469,557. Subsequently the legislature began working on a new apportionment scheme to reflect the change in population among the State's voting districts.

The original 1981 apportionment bill provided for a 63 member House of Representatives. Niobrara County with a population of 2,924 would be combined with Goshen County with a population of 12,040 persons and the two counties would have shared two representatives. Each member of the House was to represent about 7,500 persons.

The 1981 Wyoming Apportionment Bill was later amended to provide that the Wyoming House of Representatives would be a 64 member body, with each member now to represent approximately 7,300 residents. Goshen County retained its two representatives but the 64th member was awarded to Niobrara County with its scant population of 2,924 persons. Had the 64th representative been awarded purely on population, Sweetwater County should have received the additional representative.

The sponsor of the Apportionment Bill testified the legislature finally passed the apportionment plan after Niobrara County was given its one representative in order to give Niobrara County "its day in court." He testified the bill's grant to Niobrara County of its own representative had nothing to do with population considerations. In fact, the 1981 Apportionment Act, W. S. § 28-2-109, provides if a determination is made that the legislative grant of one representative to Niobrara

County is found to be unconstitutional or have an unconstitutional result, then Niobrara County shall be joined to Goshen County in a single representative district or, in other words, the House of Representatives shall become a 63 member body. The combination of Niobrara with Goshen would have given 14,964 residents two representatives; thus, each representative would represent 7,482 residents.

Pursuant to the 1981 Wyoming Apportionment Act the ratio for apportionment of the representatives is the smallest number of people per representative which when divided into the population in each representative district as shown by the official result of the 1980 Federal Dicennial Census, which fractions rounded to the nearest whole number, result in a House with sixty (63) representatives. Whether the legislature is a 63 member or 64 member body the results are the same: Niobrara County has less than 40% of the number of persons needed to deserve its own representative and, therefore, when rounded to the nearest whole number as the statute requires, Niobrara County alone should receive no representative. For this reason the legislature alternatively combined Niobrara with Goshen County.

The three judge district court below considered the case, reviewed the Constitution, Articles and prior Wyoming apportionment cases in upholding the 1981 scheme.

In the first Federal Wyoming Apportionment case, *Schaefer v. Thomson,* 251 F. Supp. 450 (1965), Niobrara County had a population equalling more than 50% of the number of persons needed to elect a representative and the same was true in the 1971 apportionment scheme. *Thompson v. Thomson,* 344 F. Supp. 1378 (1972).

Since that time, however, the law has been further clarified by additional case decisions. *Swann v. Adams,* 285 U.S. 440, 17 L.Ed.2d 501, 87 S. Ct. 569 (1967); *Kilgarlin v. Hill,* 386 U.S. 119, 17 L.Ed.2d 771, 87 S. Ct. 820 (1967); *Whitcomb v. Chavis,* 403 U.S. 124, 29 L.Ed.2d 363, 91 S. Ct. 1858 (1971); *Mahan v. Howell,* 410 U.S. 315, 35 L.Ed.2d 320, 93 S. Ct. 979, and (U.S.) 36 L.Ed.2d 316, 93 S. Ct. 1475 (1973); *Chapman v. Meier,*

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420 U.S. 1, 42 L.Ed.2d 766, 95 S. Ct. 751 (1975); *Connor v. Finch*, 431 U.S. 407, 52 L.Ed.2d 465, 97 S. Ct. 1828 (1976).

Through its relatively short history, apportionment law has come to adopt certain statistical measures which have been used to provide even more concrete guidelines and standards for evaluating vote dilution in apportionment cases. Although in the early 1960s there was a heavy reliance on the minimum number of persons electing a majority number of representatives as a standard of measurement, that measurement has been pushed to the wayside in favor of the more statistically accurate measurement methods of vote dilution like ratio and overall relative range.

In a 64 member Wyoming House of Representatives, the ratio is 3.25 to 1 and the overall relative range is 89% while a 63 member House of Representatives has a ratio of 2.09 to 1 and an overall range of 66%. The difference, therefore, from giving Niobrara County one representative as opposed to combining Niobrara and Goshen Counties is measureable and results in a ratio difference of 1.16 (3.25 - 2.09) and an overall relative range difference of 23% (89% - 66%). The deviation reflected by Niobrara County's combination with Goshen County alone equals and exceeds the deviation of the apportionment plans invalidated by the United States Supreme Court in previous cases. The 1981 Wyoming Senate has an overall ratio of 1.84 and an overall relative range of 64%.

Wyoming experiences a situation where a citizen from Niobrara County with a population of 2,924 persons has a vote weighted 3.2 times more heavily than a vote from a Washakie County citizen where a population of 9,496 persons also votes for only one representative.

Synthesizing the late 1960s - early 1970s case decisions, the Supreme Court has established the 10% de minimis rule for state legislative districts wherein states are not required to justify apportionment plans having an overall relative range of 10% or less. *Gaffney v. Cummings*, 412 U.S. 735, 37 L.Ed.2d 298, 93 S. Ct. 2321 (1973); *White v. Regester*, 412 U.S. 755, 37 L.Ed.2d 314, 93 S. Ct. 2332 (1973). The Court has gone

so far as to say there is no prima facie equal protection violation under the 14th Amendment of the Constitution of the United States, absent special justification, when the overall range is 9.9%; however, a prima facie violation does occur when the overall relative range is greater than 9.9%. *Connor v. Finch, supra.* If the overall range is greater than 9.9%, the greater deviation may be upheld if based upon sufficient and acceptable state policy. Thus, in *Mahan v. Howell, supra,* the Supreme Court found that preservation of political subdivision boundaries justified a 16% "limited" departure from strict population equality in state legislative districts.

Prior to the *Schaefer* suit, the 1963 Wyoming Senate had an overall ratio of 9.82 to 1 and an overall relative range of 205%. The Wyoming House of Representatives had an overall ratio of 2.59 to 1 and an overall range of 90%.

Although the apportionment of the 1963 House and Senate was attacked, the *Schaefer* court determined that the representation in the House of Representatives was not violative of the 14th Amendment to the Constitution of the United States while further recognizing that both Houses of the bicamerial state legislature must be apportioned substantially on a population basis. Additionally, the *Schaefer* Court held that portion of Section 3, Article 3 of the Wyoming Constitution which provided that each county shall constitute a senatorial district and have its own senator to be unconstitutional.

The 1963 Senate was modified as a result of the *Schaefer* Court's findings. After modification, the Wyoming Senate had an overall ratio of 2.08 to 1 and an overall range of 71%.

Although the Supreme Court summarily affirmed the *Schaefer* decision, *Harrison v. Schaefer,* 383 U.S. 269, 86 S. Ct. 929, 15 L.Ed. 2d 750 (1966), it is apparent the *Schaefer* decision could not stand in view of later Supreme Court decisions. Nonetheless, the three judge panel relied principally on *Schaefer* in justifying its decision to uphold the 64 member house apportionment plan in the State of Wyoming.

When the apportionment of Wyoming Senate and House of Representative's Apportionment Plan was attacked in the

1971 case, *Thompson v. Thomson, supra*, the *Thompson* Court held the apportionment was not unconstitutional as to either house even though the 1971 Wyoming Senate had an overall ratio of 1.63 and an overall range of 50% and the House of Representatives had an overall ratio of 2.59 and an overall range of 86%.

The thrust of appellants' suit assails: (1) generally the Wyoming State constitutional article providing each county with a representative and (2) specifically the portion of the 1981 Wyoming Apportionment Plan giving Niobrara County its own representative.

Appellants, in their Complaint, prayed that that portion of the Wyoming State Constitutional provision providing that each county shall have a representative and the portion of the 1981 Wyoming Apportionment Plan which gives Niobrara County its own representative be declared unconstitutional and for such other orders as would be necessary to afford full protection and relief to Appellants. A trial was held to determine whether Appellants were entitled to relief. The questions presented herein were specifically considered at that time.

Although Niobrara County has lost more than 700 persons since 1971 while the State of Wyoming has gained approximately 140,000 and the legislature has remained essentially the same size, the three judge panel found that the deviations in voting power were de minimis and that it did not constitute invidious discrimination because Wyoming is a unique state which places strong emphasis on the county unit as a primary administrative agency of the state government.

STATEMENT OF REASONS

The Court has not squarely addressed the consideration of whether a state may elect to treat its arbitrary political subdivision boundaries of importance paramount to equal representation of all voters.

Reviewing the facts of this case against the historical back drop of Wyoming State Apportionment case law evidences a dangerous trend developing which will continue to be violative

of substantial and basic constitutional rights if unchecked. In this large yet sparsely populated state the disparity in voting power of Wyoming citizens is likely to become enhanced.

To refrain from giving this case adequate consideration will be construed as a reversal in current apportionment law thereby spawning substantial regeneration of apportionment litigation.

If full plenary consideration is given this case, the court shall have the benefit of all the pertinent facts and issues.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this Appeal.

Respectfully submitted,

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